Edition of *Pollock and Mulla* the footnote to page 253 states that the statement in the 6th Edition may be too wide. The production of the money is undoubtedly the best proof that a debtor is able and willing there and then to pay his debt and in the absence of further authority I am not prepared to follow the decision in the Calcutta case.

I therefore dismiss this appeal with costs. Vacant possession to be delivered by July 31st 1948.

Appeal Dismissed.

VARTHAMMAL v. TAN YEE MOH.

[App. Civil Juris. (Pretheroe, Ag. C.J., M.F., Murray-Aynsley, C.J., S. and Russell, J.) June 4, 1948]
[Ipoh — Civil Appeal No. 25 of 1947]

Rent and Charged Land (Restriction) Enactment — Necessity of demand for rent.

This was an appeal by the landlord from a judgment of Mr. Justice Evans in favour of the tenant (See (1948) M.L.J. 55).

Held, (1) that where rent is claimed by privity of estate and not on a covenant the landlord must demand the rent on the demised premises; (2) that there was a conflict of evidence in this case as to whether there was a demand of the rent on the premises and as to whether the rent was payable in advance or in arrear and that therefore there must be a retrial.

CIVIL APPEAL.

S. M. Sharma for the Appellant.

Lim Cheng Ean for the Respondent.

Pretheroe, Ag. C. J. : — In this appeal I have had the advantage of reading the judgment of Murray-Aynsley, Chief Justice, Singapore, and I am in agreement with his conclusion and his reasons therefor.

On one point I wish to add a few words of my own. After the exchange of letters dated the 23rd of June, 1947, and the 24th of June, 1947, respectively, it was obvious that a vital point in this case was whether the rent was payable in advance or in arrear. It was also known that the tenant was in occupation of the premises by virtue of an agreement with the previous owner and not by virtue of one with the present owner who was the plaintiff in the original action. Yet, in her evidence, the plaintiff never once referred to the point while the witness Muthiah only referred to it indirectly and inconclusively. He said that on the 28th or 29th of each month the plaintiff gave him a signed receipt for the following month to hand to defendant *when the rent was paid,* and again that "on the 2nd or 3rd of every month the rent was paid".

The rent receipts exhibited in this case are inconclusive for present purposes and may even indicate that the method of payment was changed some time after the plaintiff became the landlord.

The only evidence regarding this matter given by the defendant was "I pay on the last day of every calendar month. Rent is due then". Most of the rent receipts bear two dates: that shown on the body of the receipt is that on which the plaintiff signed it and which, as already stated, was prior to the payment, while the second was endorsed on the receipt by Muthiah when he received the rent. If those endorsements were correctly made they show that in fact defendant rarely paid on the last day of any month. Thus his evidence, though apparently definite, is greatly discounted. In such circumstances it is impossible for an appellate tribunal to decide a point which must be decided before a decision can be reached, and therefore I agree that the case must be heard again before a different District Court Judge.

I agree with Murray-Aynsley, Chief Justice, Singapore, regarding the payment of costs.

Murray-Aynsley, C. J. : This appeal arises out of what was originally a suit in the Taiping District Court to obtain possession of premises in that town. It appears that one Tan Yee Moh was tenant of No. 297 Kota Road, Taiping. We know nothing as to the terms of the tenancy. Some time or other, we do not know the exact date but it seems to have been near the beginning of the month of November, 1945, one Varthammal purchased the property. Soon afterwards the purchaser wanted the premises for her own occupation and took steps to recover possession. The first step that she took was to cause a letter to be sent by Mr. Sharma, her solicitor, on May 19th, 1947, which appears at page 29 of the record. At that time the tenant was protected by Rent and Charged Land (Restriction) Enactment. On June 3rd of the same year Mr. Sharma wrote a further letter which appears at page 21. Later the owner took proceedings in the District Court (on August 6th). In these proceedings the owner had to show that rent was 14 days in arrear in order to avoid going before the Rent Board. The period for which the rent was alleged to be in arrears was that which immediately followed June 1st. In order to succeed the owner had to prove that rent was payable in advance. At the hearing the evidence seems to have been directed to this point and also to the question of whether or not there was a demand for the June rent on the premises.

On the latter point there was a conflict of evidence but the learned District Judge does not seem to have decided that issue of fact, but seems to have thought that it was unnecessary to decide the question in view of the opinion he had of the underlying question of law, viz. that it was not necessary for a landlord to make a demand on the premises. On the former question he seems to have considered that the fact that the rent for May was paid early in that month as decisive. Actually it appears that on several occasions the rent was paid early in the month to which it related. I do not regard this as conclusive but merely as evidence. In the present case there is no allegation that the rent was payable in advance before the premises were sold. The claim to payment in advance is based on an alleged agreement made after the sale. In view of the findings the District Judge decided in favour of the landlord. The tenant appealed.

On the hearing of the appeal Mr. Justice Evans in an erudite judgment decided in favour of the tenant solely on the ground that the landlord must demand the rent on the demised premises, where the rent is claimed by privity of estate and not on a covenant. With this proposition I agree and have nothing to add. The proposition is put briefly in *Roscoe* (Evidence in Civil Actions). It is a good defence in an action of *Debt* for rent that the defendant was on the premises demised, ready to pay the rent at the time it became due but the plaintiff was not there ready to receive it. In the present case the landlord's claim would have lain in debt and not in covenant. If the landlord was not able to sue I do not think that rent could be said to be in arrear within the meaning of the proviso. There is, however, a conflict of evidence as to whether there was a demand on the premises. Until that issue of fact is resolved I do not think that the case can be decided. I am afraid that there must be a new trial before a District Judge.

The principal difficulty is about costs. I think that the tenant should have the costs of the appeal before Mr. Justice Evans and the landlord here. The costs of the original hearing to abide the result of the new trial.

Russell, J. : — I have read the judgment of the Honourable the Chief Justice of Singapore. I agree with it and have nothing to add.

Retrial Ordered.